IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

C. S. THOMPSON ET AL.,
PLAINTIFFS IN ERROR,

v.

LOS ANGELES FARMING AND MILLING COMPANY,
DEFENDANT IN ERROR.

No. 87.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

Counsel for defendant in error in this case have filed two briefs, the first quite lengthy and the second quite short. The reason for the great length of the first seems to be found in the fact (stated therein) that they had not seen a copy of our opening brief, and consequently they proceeded to debate about all the questions presented in the trial court, including even the question of their client's alleged prior possession of the land in controversy. But this question—it is fair to presume—is one which, for several sufficient reasons, this Court will not consider.

First. Because it is not a Federal question.

Secondly. Because it is a question of fact, and not of law, and this case comes here on writ of error, and not on appeal.

Thirdly. Because said question was neither considered nor passed upon by the California Supreme Court; and

Fourthly. Because this question is not presented in the assignment of errors. If, contrary to our expectations, this Court should think proper to go outside of our assignment of errors, and outside of the points decided by the California Supreme Court, and look into the volume of testimony embraced in this record, in order to inquire into the character of the possession of the defendant in error of this immense tract of land, it would find that its possession was a mere scrambling possession, almost incessantly interrupted by individual settlers, who, like everybody else, were perfectly satisfied that, under the decisions of this Court, these lands were in fact Government property. It is true, as the evidence shows, that these individual settlers, as a rule, did not long maintain their possession, for the reason that they preferred to abandon their little settlements, rather than squander their slender means in endless litigation against a powerful corporation with unlimited resources at its back. As one of these settlers remarked when on the witness stand, he "might just as well have undertaken to wrestle with a mountain as with this corporation."

Counsel have also discussed the question of the survey of the alleged grant. But if, as we maintain is the case, the decree of confirmation is a nullity for want of jurisdiction in the Board of Land Commissioners, then both the survey and the patent must fall with the decree, just as the branches of a tree must fall with the trunk.

WAS THE DE CELIS CLAIM EVER ACTUALLY SURVEYED?

But even if the alleged decree of confirmation were not a nullity for want of jurisdiction to make it, as we maintain it was, still we contend that the patent in this case is void (not because of an *erroneous* survey but) for the reason that there was actually *no* survey of this claim ever made on the ground, as required by the 13th section of the act of Congress of March 3, 1851, entitled "An Act to ascertain and settle private land claims in the State of California." On the trial of this case there was much evidence tending strongly to show that no survey was ever actually made of this claim. Henry Hancock, Deputy U. S. Surveyor, who claims to have made this survey, had himself previously made a Government survey embracing the same lands, running and marking the township and range lines; and the evidence tends overwhelmingly to show that, instead of surveying the de Celis claim on the ground, he simply sat in his office and platted this claim, adapting his courses and distances, as best he could, to the lines he himself had previously run in making the Government survey. In doing this he had necessarily as a rule either to leave his new lines without any monuments to mark them, or else he had to assume the existence of certain natural or artificial monuments that did not exist. Hence it was that no surveyor has ever been able to locate by monuments on the ground the so-called patent survey. After a large sum of money had been expended in making what is known in the record as the Reynolds survey for the purpose of locating the lines of the alleged patent survey, these defendants in error subsequently, at a cost of four thousand dollars (see folio 520), employed one C. A. Ensign to try his hand at the same impossible

job. As an evidence of the non-existence of certain of the natural monuments named in the so-called patent survey, witness Ensign who made this four thousand dollar effort, testifying for defendant in error, when referring to certain trees named as monuments in this alleged survey, said:

"There are two or more trees given. We would expect to find some remains of it, either stumps or trees, but in that case we could find nothing but the situation at the bank of the creek." (See Record, 150.) And for much more of the same sort, see Record, 151, 152.

Again, turning to Record, page 244, we find that part of Surveyor Hancock's report where he describes the line running from Station 16 to Station 17, as follows: "Thence north 75½° W. 134 chains to Station 17, and marked an oak tree 20 inches diameter on the mountains, S. F. 17." But Reynolds in his report says that he could find no tree at the point indicated to correspond with that mentioned by Hancock, * * * and he finally selected and marked a tree as Hancock's corner which lacked 5¼° of being upon Hancock's bearing, and fell forty chains or about half a mile short of the location assigned by Hancock as that of his Station 17. (See Record, page 88.) But Surveyor Hancock, in making his descriptive map upon which the alleged patent is based, evidently adhered to his imaginary tree without any reference to that real tree half a mile away, and on an entirely different bearing, afterwards found and marked by Reynolds, and subsequently adopted by Ensign, as Hancock's Station 17. As proof positive of this fact, turning to Record, pages 244, 245, (folios 725, 726, 727, 728,) we find that the Hancock description, after running from said Station 17 to Station 34, "intersected the south boundary of township No. 2, north of the base line of range No. 17 W. of San Bernardino meridian, 25 chains *west* of corner of sections 3, 4, 33,

34 to a live oak," etc. But while the Hancock line, running from his imaginary tree at Station 17, down to and across the south boundary of township No. 2 * * * 25 chains *west* of the common corner of sections 3, 4, 33, 34, both Reynolds and Ensign, running from their newly found tree at their assumed Station 17, following substantially the same courses and distances as the Hancock description, down to the same south boundary of township 2, intersect that boundary (not 25 chains *west*, but) 15.92 chains east, of the said common corner of sections 3, 4, 33, 34; see Record, page 162 (folio 478) and plaintiff's exhibit 30 (map), thus showing conclusively that the tree referred to by Hancock as marked his Station 17, must have been an entirely different one from the real tree found and marked by Reynolds and adopted by Ensign. There seems to be absolutely no other theory that will explain how it was possible for both Hancock and Reynolds to start from Station 17 and run upon the same courses and distances down to the south boundary of township 2, and one party strike that south boundary 25 chains *west* and the other strike that same boundary 15.92 chains *east* of the common corner of sections 3, 4, 33, 34. This makes it clear that this line run by Reynolds, and afterwards retraced by Ensign, is not the line referred to by Hancock and delineated on the map that forms the basis of the alleged de Celis patent.

Then this question arises: If Hancock never made any actual survey on the lines indicated by Reynolds and Ensign, did he make any *actual* survey on the ground? Surveyor Ensign, chief witness for defendant in error, swears that the alleged Hancock "survey was not made according to the minutes," Record, page 212 (folio 630.) If then, as Ensign testifies, Hancock never made any survey according to his own minutes, and if he never made

a survey corresponding with that of Reynolds or of Ensign, as we think we have demonstrated, where is the evidence that he ever made any actual survey? And if he did, where is the land that he surveyed?

By following and comparing the Hancock field notes with those of Reynolds and of Ensign, we find similar irreconcilable discrepancies and similar proof that Hancock never made any actual survey of this de Celis claim. It is true that R. Pico, on behalf of defendants in error, testified that he was present and assisted in making the survey, but he swears that in making the survey they "commenced at the southeast corner and ran the south line first." Record, 140, (folio 412.) Whereas, Hancock's report and field notes represent that he ran in the contrary direction, and that instead of running the south line first he ran it last. (See Record, page 242, folio 720 and following.) Pico also fixes an entirely different time of year for the making of the survey from that indicated in Hancock's report. (See Record, page 142, folios 418–419.) It is true all this does not prove that the witness wilfully swore falsely. But the fact that he fixes a different time in the year from that indicated by the surveyor, and the fact that he claims that they started in the opposite direction from that shown in the surveyor's notes, especially when taken in connection with his statement (Record, page 142, folio 418) that he had "assisted Mr. Hancock to make several surveys" would indicate that it was most probably either the Government survey of these lands or else a survey of some other lands that he had assisted in making.

If, then, this alleged Hancock survey is fictitious and void, it necessarily follows that the patent based thereon is also void. (See Sec. 13, of said Act of March 3, 1851. Also *Telfener* v. *Russ*, 162 U. S., 182.)

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In presenting this argument we are well aware that on a writ of error this Court will not review the facts of the case under consideration except to the extent necessary to determine whether or not the State Supreme Court has committed one of the assigned errors of law.

But if there was any evidence in this case even tending to show that there never had been any actual survey of the de Celis claim, it was the duty of the trial court to allow that question to be decided by the jury. But in this case the trial court took this whole question, as to the *fact* of the survey, entirely away from the jury, by instructing them to find a verdict for the plaintiff. And this instruction is assigned as error.

We deem it needless to answer any of the opposing counsels' arguments or authorities in support of their contention that we are not in a position to attack a United States survey, however erroneous or however fraudulent it may have been. We frankly concede all that. But our position is, that while we are not in a position to attack an actual survey, we are in a position to attack a merely imaginary or fictitious survey, and to show that instead of being a survey in fact it is a mere myth.

As will be seen by our opening brief, the main question relied on by plaintiffs in error is, as to whether or not the California Supreme Court erred in affirming the action of the trial court, in its refusal to allow plaintiffs in error to introduce in evidence the petition of Eulogio deCelis presented to the U. S. Board of Land Commissioners, asking for a confirmation of his claim, upon which claim the alleged patent is based, under which the defendant in error asserts title to the land in controversy. The object in offering this document, together with other papers named, was for the purpose of proving thereby that the petitioner did not claim said lands "*by virtue of any right or title*

derived from the Spanish or Mexican government;" and that for this reason, the Board of Land Commissioners had no jurisdiction over the case. We then maintained, and have ever since, and do now maintain, that because of this want of jurisdiction the decree of the Board confirming the grant was absolutely *void*, and that being *void*, all subsequent proceedings based thereon, including the issuance of the patent, were equally *void*.

Opposing counsel, both in their original and in their supplemental brief, have practically wasted an immense amount of good argument in endeavoring to prove a proposition that we have *never* denied, namely, that we cannot collaterally attack a United States land patent. But there is a vast difference between a *patent* and a mere *nullity* in the *shape* of a patent.

The *real* question here is, not as to the right of the plaintiffs in error to attack a United States patent, but as to their right to prove that the document introduced in evidence by defendant in error as a patent had been issued without authority of law, and was in fact a *nullity*.

It seems to have been almost as difficult, both for opposing counsel and for the learned justice of the California Supreme Court who rendered the decision in this case, to understand the language employed by this Honorable Court in a certain decision cited by them as authority against the plaintiffs in error as it is for them to understand the language of our brief. We refer to the decision of this Court in the celebrated case of *Beard* v. *Federy*, reported in 3d Wallace, 478. This is a case which (as we read it) stands as a *controlling* and *unanswerable* authority in favor of our chief contention, namely, that the California Supreme Court erred in affirming the action of the trial court in its refusal to allow plaintiffs in error to introduce in evidence the petition of de

Celis, upon which the California Board of Land Commissioners acted when confirming his claim. In order that this Court may judge for itself as to whether *Beard* v. *Federy*, is an authority for or against our right to introduce the original petition of de Celis, for the purpose of showing a want of jurisdiction in the Board, we shall here insert that part of said decision which has a direct bearing on this question. In deciding that case the court said:

"The petition sets forth two sources of title, one founded on the laws of Spain and Mexico, and the other on continued possession of the property for a period of exceeding half a century. It avers that, at the time of the conquest and cession of California to the United States, the canon law of the Roman Catholic Church was in force as the law of Mexico, as it had been previously of Spain when Mexico was a dependency thereof, in all things relating to the acquisition, transmission, use and disposition of property, real and personal, belonging to the church, or devoted to religious uses; that, by the laws of Spain and Mexico, it was not necessary that a grant of land for ecclesiastical or church purposes should appear by deed or writing, public or pr vate, but that the right of the church to such property was always recognized and regulated by the canon law; that the premises in question being church lands at the Mission of San José, consisting of the church, church-yard, burial ground, orchard and vineyard, with the necessary buildings and appurtenances, the whole embracing a little over nineteen acres of land, had, for a long period, been devoted to religious purposes and uses; that, by the canon law and the laws of Spain and Mexico, the title, control, and administration of all ecclesiastical and church property was vested in the bishop and clergy of the diocese, who, for such purposes, were regarded as a body corporate; and that the Catholic Church, at the date of the conquest and cession of California to the United States, had been

in the actual and undisturbed possession of the premises in question since the year 1797.

"These averments clearly present a case within the jurisdiction of the Board of Commissioners. They show 'a claim by virtue of a right or title derived from the Spanish or Mexican government,' which is all that is required by the act of 1851. That act does not define the character of the right or title, or prescribe the kind of evidence by which it shall be established. It is sufficient that the right or title is derived from the Spanish or Mexican government, and it may in some instances rest in a general law of the land, as is the case usually with the title of municipal bodies under the Spanish and Mexican systems, to their common lands.

"The board having acquired jurisdiction, the validity of the claim presented, and whether it was entitled to confirmation, were matters for it to determine, and its decision, however erroneous, cannot be collaterally assailed on the ground that it was rendered upon insufficient evidence. The rule that applies to the judgments of other inferior tribunals applies here—that when it has once acquired jurisdiction, its subsequent proceedings cannot be collaterally questioned for mere error or irregularity."

In this case of *Beard* v. *Federy*, it does not seem that anybody, either counsel or court, ever raised or thought of raising the question as to the right of the party, denying the *validity* of the patent to prove its invalidity, if he could, by showing that it rested upon a decree that was void for the want of jurisdiction in the tribunal that made it. Nor was any question raised in that case as to the right of the party claiming adversely to the alleged patent to show by the original petition of the claimant that his claim was not "by virtue of any right or title derived from the Spanish or Mexican government" with a view of proving the want of jurisdiction in the Board, the void nature of its decree of confirmation, and the con-

sequent nullity of the patent based thereon. Mr. Justice Field, in delivering the opinion of this Court, did not say to the party denying the validity of the patent: you cannot assail this patent collaterally, no difference what the claimant's petition shows; no difference whether the board had jurisdiction to confirm the claim or not; no difference whether the patent is void or not, it cannot now be collaterally assailed. Had such been the decision of the court it would undoubtedly be an authority against us. But, on the contrary, taking it for granted that the party assailing the patent as void had a right to make good his contention by proving the nullity of the decree of confirmation on which the patent rested, the court proceeded at once logically and forcibly to discuss the question as to whether or not the petition of the land claimant did or did not in fact show a right or title derived from the Spanish or Mexican government; in order thereby to determine whether the board had acted without jurisdiction. And *then*, after having settled the question that the claimant's petition in that particular case *did* show "*a right or title* derived from the Spanish or Mexican government," and that this "*is all that is required by the Act of* 1851" in order to give the board jurisdiction, the court then proceeds to say:

"The board *having acquired jurisdiction*, the validity of the claim presented, and whether it was entitled to confirmation, were matters for it to determine, and its decision, however erroneous, cannot be collaterally assailed on the ground that it was rendered upon insufficient evidence."

And there can be no doubt but that this is the law. But the fact that such a decision as this could be cited, both by able counsel and an able court, as authority to

prove that these plaintiffs in error had no right to attack collaterally either what purported to be a judicial decree, or a land patent based thereon, because of a want of jurisdiction to make the decree or to issue the patent, only goes to prove that it is exceedingly fortunate for the reputation of this Honorable Court that it cannot be held responsible for all the strange interpretations that may be given to its decisions, either by other courts or by eminent attorneys.

It will be observed that the learned justice of the California Supreme Court, who rendered the decision in the case at bar, must *undoubtedly*, either through accident or mistake, have failed to read the whole decision in this case of *Beard* v. *Federy*. Here is his reference to that decision and the quotation he makes therefrom, he says:

"The same question was presented in Beard *v.* Federy, 3 Wall. 478, where, after the patent had been introduced in evidence by the plaintiff, the defendant produced the petition before the board of land commissioners, and insisted that it showed a want of jurisdiction in the board, for the reason that it did not set forth any right or title derived from the Spanish or Mexican government."

But the Court said:

"The board having acquired jurisdiction, the validity of the claim presented, and whether it was entitled to confirmation, were matters for it to determine; and its decision, however erroneous, cannot be collaterally assailed, on the ground that it was rendered upon insufficient evidence," etc.

But his honor omits *entirely* all reference to that portion of the decision which shows the reason *why* it was that in *that* case the board had jurisdiction. The very *marrow* of that decision is this; referring to the averments of the claimant's *petition*, this Court said:

"These averments clearly show a case within the jurisdiction of the board. They show a claim by virtue of a right or title derived from the Spanish or Mexican government, which is all that is required by the act of 1851."

But suppose that in the *Beard* v. *Federy* case this Court instead of holding, as it did hold, that the averments of the claimant's petition "showed a right or title derived from the Spanish or Mexican government" had on the contrary held that those averments did *not* show a right or title derived from the Spanish or Mexican government, would it not have been logically compelled to hold that the board acquired no jurisdiction and that having acquired *no* jurisdiction in the premises, its decree of confirmation, and all proceedings based thereon, were void? Now, while this Court, in this case of *Beard* v. *Federy*, *did* unquestionably decide that the averments of the claimant's petition, as presented in that case, did show "a claim by virtue of a right or title derived from the Spanish or Mexican government," it is equally true that this same Court, both in the case of *United States* v. *Vallejo*, 1 Black, 541, and *United States* v. *Workman*, 1 Wallace, 745, decided that averments like those set forth in the petition of Eulogio de Celis do *not* show "a claim by virtue of a right or title derived from the Spanish or Mexican government." Therefore, upon the authority of those decisions, we maintain that those averments show a claim over which the board of land commissioners had no jurisdiction whatever. The petition passed upon in the case of *Beard* v. *Federy* alleged a claim of title, resting upon a provision of the canon law, which formed a part of the laws of Spain and of Mexico; and this Court said that this allegation did in fact show "a claim by virtue of a right or title derived from the Spanish or Mexican government." But neither in the Vallejo

case, nor in the Workman case, nor in the case at bar, did the claim as presented to the board rest upon the *canon laws* as incorporated in the laws of Spain and Mexico; but in each of these cases the claim as presented rested upon alleged *sale* by Governor Pico to the claimant. And both in the Vallejo case and the Workman case, this Court has solemnly declared that there was *no power* in the California governor to make any such sales, and decided, in effect, that such sales gave no claim by virtue of "a right or title derived from the Spanish or Mexican government." So that unless this Court is prepared to overrule the doctrine laid down in both those cases, it is difficult to see how it can fail to reverse the decision in this case.

Inasmuch as opposing counsel, in their efforts to bolster up a bad case, have thought it necessary to characterize these plaintiffs in error as "*intruders*," "*marauders*," and "*conspirators*," it cannot be considered out of place, speaking within the limits of the record, and of the judicial history of California land titles, to say a few words in explanation of the motives that actuated these appellants in associating themselves together for the purpose of contesting this (as they believe) spurious land claim. This San Fernando Ex Mission claim, when it first made its appearance, purported to embrace about 13 or 14 leagues. And this was the quantity of land named in the so-called decree of confirmation. But when the alleged patent came forth "*presto change*" this thirteen leagues had suddenly grown to the enormous proportions of about double its original proportions, that is to say, it had grown to be about twenty-six leagues, covering an area of between one hundred and sixteen thousand and one hundred and twenty thousand acres of one of the finest bodies of land in the State of California, in the very heart of

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Los Angeles county, and immediately adjacent to the great and growing metropolis of Southern California. Long before this corporation, defendant in error, purchased the half of this immense claim now in controversy, it was a matter of public notoriety, not only in Los Angeles county, but throughout the State of California, that this, our highest American Court, had decided, that, under the Mexican law, Governor Pico never had any power to dispose of the public domain in the way that he had attempted to dispose of this San Fernando tract.

One thing that brought this ruling of our Supreme Court in a special manner to the knowledge of Los Angeles people was the fact that the land involved in the aforesaid suit of the United States *v.* Workman, is located in the same county, and near by the lands now in dispute. So that everybody in that community, knowing that the Workman claim and the de Celis claim were exactly alike, very naturally believed that, since the lands claimed by Workman belonged to the public domain, so did the lands claimed by de Celis. The only difference between the two cases was, that the Workman case had been appealed to and decided by the Supreme Court, while the de Celis claim, either through the ignorance, the negligence, or the venality of certain Government officials, had not been appealed. But the settlers were advised by attorneys, in whom they had the utmost confidence, that a lack of jurisdiction in the board of land commissioners rendered their decree confirming the de Celis claim ineffectual and void, so that it needed no reversal by the Supreme Court; and that the lands covered by the de Celis claim were just as much a part of the public domain as were those embraced in the Workman claim. But while religiously believing that these were public lands and not the property of the corporation claimant, they

knew from sad experiences that no *one* man of moderate means could defray the enormous expense of contesting with this millionaire corporation the validity of this claim, through the various courts and up to this Court of last resort. Hence it was that they formed an association called the Settlers' League, composed of sober, honest, industrious, hard-working men, who resolved to put a portion of their hard earnings into a common fund, not for the purpose of despoiling anybody of his rights, but for the purpose of preventing this Government from being permanently despoiled of upwards of 116,000 acres of its best lands. And upon what did these settlers base their hopes of success in so unequal a contest? Their hopes of success rested upon their conscious rectitude of purpose; their love of right and their abiding conviction that this august tribunal of last resort, in deciding their case, would be consistent, and stand by those same lofty principles of law and justice that guided it in rendering those able decisions to which reference has already been made. This little association of poor men, trusting to the law as laid down by this Court, were willing conjointly to risk their hard earnings in an honest and determined effort to wrench from the illegal and wrongful grasp of the defendant in error this immense property and restore it to the Government, its rightful owner. And because they did this thing they have been branded by opposing counsel as a band of conspirators. Now, *conspirators* are those who band themselves together for some unlawful purpose; for the purpose of perpetrating a wrong. If, then, there are any *conspirators* in this case who are they? Are they the men who, under the corporate name of the Los Angeles Farming and Milling Company, are struggling with all their might and money to maintain their unlawful grasp upon millions of dollars' worth of property

which, long before they purchased it at the diminutive figure of $115,000, they must have known from the decisions of this Court was the property of these United States, or is it that little band of toilers, who are putting forth their utmost efforts to prevent this great wrong—this most disgraceful public scandal?

Something has been said by opposing counsel about the good *faith* of this appellee in its purchase of these lands. Of course, that is a question which does not arise in this case, but if its claim to this land should (as we think it must) be adjudged void, then, under what is known as the Conness Act of Congress, passed in 1866, if the defendant in error honestly believes it can bring itself within the saving provisions of that act (which we do not think it can) it will then be in order for it to prove *its good faith*, as one of the essential conditions for the purchase of these lands from the rightful owner at the Government price. And, even adding this price to that already paid to the spurious claimant, the company would still have made millions by the speculation.

Z. MONTGOMERY.